Ng Boon Seng v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 44–23 OF 2009
MOHD AMIN FIRDAUS JC
24 DECEMBER 2009

Criminal Procedure — Habeas corpus — Application — Grounds for — Whether grounds for detention fell within scope and ambit of the Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether detention order mala fide — Whether there was procedural non-compliance — Whether irregularity in detention rendered detention order invalid

The applicant was arrested and detained for the purpose of an investigation under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316). Upon being served with a detention order under s 6(1) of Act 316, the applicant applied for a writ of habeas corpus on the grounds, inter alia, that (i) his detention was not in compliance with the law whereby the arrest under s 3 of Act 316 must be for the purpose of investigation; (ii) breach of art 5(3) of the Federal Constitution which requires that he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice; (iii) breach of art 151 of the Federal Constitution ('the Constitution'); (iv) infringement of his constitutional right to make proper representations to the advisory board amounting to infringement of natural justice as the allegations of fact were not read or shown to him; (v) contravention of s 5 of the Act 316 by failure to make available a Chinese interpreter during his attendance before the inquiry officer. The issue for determination by the court was whether the detention order was made mala fide or the grounds of detention stated in the order do not fall within the scope and ambit of Act 316 or there was procedural non-compliance.

Held, dismissing the application:

(1) The court found that there was no basis to allege fabrication as the applicant did not adduce a shred of evidence to show that there was bad faith. It was only fair and reasonable for the court to have cogent evidence produced before it in order to substantiate the claim. From the fact, there was no likelihood of obtaining baseless information against the applicant (see paras 52–54).

(2) Act 316 was made pursuant to art 149 of the Constitution titled Part XI — Special Powers against Subversion, Organized Violence and Acts and Crimes Prejudicial to the Public and Emergency Powers. Therefore any

provisions contained therein that are inconsistent with arts 5 or 9 of the Constitution cannot render the Act invalid or ultra vires the Constitution. In the instant case, the investigating officer had sufficiently informed the applicant of the grounds of his arrest when he mentioned that he gave the grounds of the arrest and also informed him about the contents in the detention order. It was implicit that the grounds are tied with the contents and thus he was being informed sufficiently (see paras 57–58 & 62).

(3) The constitutional right of the applicant to have access to legal advice must be subject to valid restriction in the interests of justice in order to avoid any undue interference during the course of police investigation. On the facts, the applicant was informed about his right to lawyer although the police officer did not specify at which point of time he was informed of the same (see paras 65 & 70).

(4) Section 5 of Act 316 gives the inquiry officer a discretion on whether to summon a witness or procure documentary evidence for the purpose of an enquiry. It was thus groundless to assert that the first respondent did not comply with s 5(3) of Act 316. The section is not mandatory (see para 73).

(5) With regards to the applicant's contention that all the allegations of facts were very vague thus depriving the applicant his constitutional right under art 151, it was not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It was improper to contend that the ground was necessarily vague if the only answer of the detained person could be to deny it. Hence, based on the authorities, the court found that the allegations of facts were not vague (see paras 75 & 80–81).

(6) The legality of the detention of a person under s 3(2) was not a condition precedent to the making of a detention order against him under s 6(1). A detention order could be made against a person under s 6(1) even when his detention under s 3(2) was irregular (see para 92).

[Bahasa Malaysia summary

Pemohon ditangkap dan ditahan untuk siasatan di bawah s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta 316'). Setelah disampaikan dengan perintah tahanan di bawah s 6(1) Akta 316, pemohon memohon writ habeas corpus atas alasan, antara lain, bahawa (i) penahanannya tidak mematuhi undang-undang di mana tangkapan di bawah s 3 Akta 316 mestilah untuk tujuan siasatan; (ii) pelanggaran perkara 5(3) Perlembagaan Persekutuan ('Perlembagaan') yang mengkehendaki bahawa dia hendaklah diberitahu secepat mungkin alasan-alasan penangkapannya dan hendaklah dibenarkan merujuk dan dibela oleh pengamal undang-undang pilihannya; (iii) pelanggaran perkara 151 Perlembagaan; (iv) pencabulan hak

perlembagaannya untuk membuat representasi yang bersesuaian kepada lembaga penasihat merupakan pencabulan keadilan semula jadi disebabkan pengataan fakta-fakta tidak dibaca atau ditunjukkan kepadanya; (v) pelanggaran s 5 Akta 316 kerana kegagalan menyediakan penterjemah berbangsa Cina semasa kehadirannya di hadapan pegawai siasatan. Isu yang perlu diputuskan oleh mahkamah ialah sama ada perintah penahanan tersebut adalah mala fide atau alasan-alasan penahanan yang dinyatakan dalam perintah tersebut tidak tertakluk dalam ruang lingkup atau skop Akta tersebut atau terdapat ketidakpatuhan prosedur.

Diputuskan, menolak permohonan:

(1) Mahkamah mendapati bahawa tiada asas dalam dakwaan pemalsuan tersebut kerana pemohon tidak mengemukakan sebarang keterangan yang menunjukkan terdapat niat jahat. Adalah adil dan wajar bagi mahkamah agar keterangan yang meyakinkan dikemukakan di hadapannya untuk mengesahkan dakwaan tersebut. Daripada fakta, tiada kemungkinan untuk mendapatkan maklumat yang tidak berasas mengenai pemohon (lihat perenggan 52–54).

(2) Akta 316 digubal berikutan dengan perkara 149 Perlembagaan Bahagian XI Kuasa Khas menentang Perbuatan Subversif, Keganasan Terancang, dan Perbuatan dan Jenayah yang Memudaratkan Orang Awam dan Kuasa Darurat. Oleh itu, mana-mana peruntukan di bawahnya yang bertentangan dengan perkara 5 atau 9 Perlembagaan tidak menjadikan Akta tersebut tidak sah atau ultra vires Perlembagaan. Dalam kes ini, pegawai siasatan telah memaklumkan pemohon dengan secukupnya alasan-alasan penahanannya apabila dia menyatakan dia memberikan alasan-alasan penangkapan dan juga dia memberitahu pemohon tentang kandungan perintah penahanan. Adalah tersirat bahawa alasan-alasan tersebut terikat dengan kandungan perintah tersebut dan oleh itu, pemohon telah dimaklumkan secukupnya (lihat perenggan 57–58 & 62).

(3) Hak perlembagaan pemohon untuk mendapat nasihat undang-undang mestilah tertakluk kepada sekatan-sekatan yang sah demi kepentingan keadilan untuk mengelakkan sebarang gangguan tak wajar semasa siasatan polis dijalankan. Daripada fakta-fakta, pemohon dimaklumkan tentang haknya untuk mendapat seorang peguam walaupun pegawai polis tidak menetapkan bilakah pemohon dimaklumkan tentang perkara itu (lihat perenggan 65 & 70).

(4) Sekyen 5 Akta 316 memberikan pegawai siasatan budi bicara sama ada untuk memanggil saksi atau mendapatkan keterangan dokumentar bagi tujuan sesuatu siasatan. Maka adalah tidak berasas untuk menegaskan bahawa responden pertama tidak mematuhi s 5(3) Akta 316. Seksyen tersebut tidak mandatori (lihat perenggan 73).

(5) Berkenaan hujahan responden bahawa kesemua pengataan fakta-fakta adalah tidak jelas dan oleh itu menafikan hak pemohon terhadap hak perlembagaannya di bawah perkara 151, tidak mungkin untuk menyatakan dengan pasti apakah yang tidak jelas itu. Ia harus berbeza melihat kepada keadaan setiap kes. Adalah tidak betul untuk menyatakan bahawa alasan tersebut adalah tidak jelas jika jawapan yang hanya boleh diberikan oleh orang yang ditahan ialah penafian. Oleh itu, berdasarkan autoriti-autoriti, mahkamah mendapati bahawa pengataan fakta-fakta tersebut adalah jelas (lihat perenggan 75 & 80–81).

(6) Kesahan penahanan seseorang di bawah s 3(2) bukanlah syarat yang mendahului pengeluaran perintah penahanan terhadapnya di bawah s 6(1). Suatu perintah penahanan boleh dibuat terhadap seseorang di bawah s 6(1) apabila penahanannya di bawah s 3(2) tidak teratur (lihat perenggan 92).]

Notes

For cases on application of habeas corpus, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2010–2015.

Cases referred to

Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3) [2001] 2 MLJ 689, HC (folld)

Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur [1976] 2 MLJ 156, FC (refd)

Cham Yoon Liang v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1989] 3 MLJ 372, HC (refd)

Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116, FC (folld)

Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 2 MLJ 129, FC (folld)

Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 MLJ 468; [1988] 1 CLJ 197, HC (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914, FC (refd)

Lee Kwan Woh v PP [2005] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

Liversidge v Sir John Anderson & Anor [1942] AC 206, HL (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449; [2002] 4 CLJ 309, FC (refd)

Mohd Faizal Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (folld)

Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403; [2006] 4 CLJ 697, FC (distd)

Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198, FC (folld)

The State of Bombay v Atma Ram Sridhar Vaidya AIR 1951 SC 157 (refd)

Tan Boon Aun v Timbalan Menteri Dalam Negeri, Malaysia & Anor [1991] 2 MLJ 55, HC (refd)
Tan Boon Liat @ Allen & Anor Et Al, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108, FC (refd)

Legislation referred to

Criminal Procedure Code s 153
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 3(2)(a), (b), 3(3), 5, 5(1), (4), 6, 6(1), (2), 9, 9(1), (2), 11C(1), 14,
Federal Constitution arts 5, 5(1), (3), 9, 149, 151, 151(a), (3)
Internal Security Act 1960 s 8(1)(a)

Mohd Amin Firdaus JC:

BACKGROUND

[1] The applicant named Ng Boon Seng (No IC 641126–07–5965) in this application was arrested by the police on 8 May 2009 and detained for the purpose of an investigation under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985, Act 316.

[2] On 6 July 2009, the police served on the applicant the detention order (exh TYL1), made under s 6(1) of the same Act 316, to be detained for two years, beginning from 6 July 2009 at Pusat Pemulihan Akhlak in Muar, Johor.

[3] The applicant now applies for a writ of habeas corpus to the court to seek redress for what he alleged to be the illegal restraint of his person and unlawful deprivation of his liberty by the respondents.

[4] As the applicant is now being detained in Muar, his wife Tan Ya Lee deposed the necessary affidavit (encl 2) on behalf of her husband.

THE APPLICANT'S GROUNDS

[5] Learned counsel for the applicant basically put forward five grounds to justify the application for the writ of habeas corpus.

Ground 1

[6] He contended that the detention of the applicant is not in compliance with the law. The arrest under s 3(1) of the Dangerous Drugs (Special Preventive Measures Act) 1985, Act 316, must be for the purpose of investigation.

[7] According to him, during the 60 day detention, no investigation was carried out. Paragraph 5 in the affidavit of Tan Ya Lee (encl 2) on this point of contention was not rebutted by any affidavit from the third respondent.

[8] The failure to prove to this court that the requirements of s 3(2)(a) and (b) of Act 316 had been complied with has flawed the detention order. There must be 'legal backing' to justify the detention under this section and in this case there was no legal backing. He argued that from 21 May 2009 to 24 May 2009 until 6.45pm, there was no legal backing.

[9] *Tan Boon Aun v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1991] 2 MLJ 55 (HC) was cited to support his contention.

[10] Learned counsel also cited *Cham Yoon Liang v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 3 MLJ 372 (HC) which held that where 'the detainee has been under continuous detention under separate laws or by separate authorisation, the authorities must justify the detention by the production of the relevant lawful detention order or authorisation'.

[11] He argued that the applicant was arrested on 8 May 2009 and the detention should have been completed on 10 May 2009 at 6.45pm. Thus from 10 May 2009 at 6.45pm, it should have expired on 21 May 2009 at 6.45pm. He pointed out that there was no authorisation letter.

Ground 2

[12] Learned counsel's next argument revolves around a purported breach of art 5(3) of the Federal Constitution which lays down that:

> Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[13] There was no affidavit evidence from the police to show that the applicant was informed of his constitutional right about the grounds of his arrest. A duty was cast on the authority to show that the applicant was informed of the grounds of his arrest and detention.

[14] The Federal Court cases of *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 and *Lee Kwan Woh v Public Prosecutor* [2005] 5 MLJ 301; [2009] 5 CLJ 631 were cited to bolster his argument.

[15] There was no affidavit in reply to this issue hence it is trite law that the third respondent admitted this claim.

Ground 3

[16] The first and third respondents had also breached art 151 of the Federal Constitution which provides that:

> Restrictions on preventive detention
>
> 151
>
> (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.
>
> (2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members who shall be appointed by the Yang di-Pertuan Agong.
>
> (3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[17] There was a clear failure to obey art 151(1)(a) of the Federal Constitution in conjunction with s 9(1) and (2) of the Dangerous Drugs (Special Preventive Measures) Act 1985 when the applicant was not given proper grounds especially the allegations of fact to enable him to make proper representations to the Advisory Board.

[18] Section 9 in essence states that the detention order on which the grounds and allegations of fact are based must be served on the person concerned and that he must be informed of his right to make representations to an Advisory Board.

[19] The grounds stated in exh TYL2 were generally quoted from Act 316 and the allegations of fact do not give the date and time of the said incidents and the identity of the applicant's assistants involved were not revealed. They are not informants and no national interest is involved.

[20] It was contended that such allegations of fact which are very vague could have been fabricated and their vagueness had deprived the applicant under art 151 to make effective representations to the Advisory Board.

Ground 4

[21] The first respondent had infringed the constitutional right of the applicant to make proper representations to the Advisory Board. There was an infringement of natural justice as the allegations of fact were not read or shown to him.

Ground 5

[22] There was contravention of s 5 of Act 316 when no Chinese interpreter was made available to the applicant during his attendance before the inquiry officer for the enquiry before her. The applicant is not fluent in Bahasa Malaysia and is only familiar with the Chinese Hokkien dialect. The enquiry was flawed because its mandatory requirement was not fulfilled.

[23] The core of s 5 states that a legally qualified inquiry officer shall be appointed by the Minister and his role is to inquire whether there are reasonable grounds for believing that the person arrested has been or is associated with any activity relating to or involving trafficking in dangerous drugs.

[24] He has the discretion to summon and examine any witnesses or require the production of any documentary evidence and then submit a written report to the Minister concerned.

[25] It was further argued that the inquiry report was not supplied to the applicant and the Federal Court had held in *Muhammad Jailani Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 697 that such a requirement under s 5 must be followed.

[26] If the inquiry report had been given to the applicant, he would have been able to make effective representations because there are different versions from the police, the inquiry officer and the applicant himself.

[27] Learned counsel submitted that in view of these grounds, the detention of the applicant was not lawful and therefore the writ of habeas corpus ought to be granted.

COUNTER-ARGUMENT BY FEDERAL COUNSEL

Grounds 1 and 2

Non-compliance with s 3(1) and (2)(a) and (b) of Act 316 and no investigation being carried out during 60 day detention

[28] Learned federal counsel argued that no affidavits in reply were filed to answer the allegation of the applicant that the third respondent had contravened the provision of s 3(2)(a) and (b) of Act 316 as the answer can be found in the Federal Court case of *Mohd Faizal Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 which held that:

> The prior irregularities in the detention of the appellant under s 3(2) are not relevant to a consideration of the legality of the detention order made under s 6(1).

[29] In answering to the assertion of the applicant that he had the right to a counsel of his choice, he referred to para 9 in encl 6 where the deponent Inspector Abdul Majid bin Mohd Kadir had deposed to:

> Pemohon juga telah dimaklumkan tentang hak-hak pemohon untuk mendapatkan khidmat peguam.

[30] The claim that the applicant was not given the allegations of fact and not informed about the grounds of arrest is answered in para 6 of encl 6 where exhs TYL1 and TYL2 were handed over to the applicant and translated to him in the Hokkien dialect, his mother tongue. Paragraph 9 in the same enclosure is also relevant.

[31] The argument of the applicant that he was not provided with the names of his assistants involved and the date and time of the days of the alleged activities and that the allegations of fact are vague so that he could have make proper representations, learned federal counsel replied that the Federal Court in *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129 held that:

A The vagueness, insufficiency or irrelevance of the allegations of fact supplied to the appellant did not relate back to the order of detention and could not render unlawful detention under a valid order of detention.

Ground 3

B Article 151 of the Federal Constitution

[32] Learned federal counsel referred to para 6 in encl 10 to show that the honourable Deputy Home Minister had on 4 December 2009 deposed to the C fact that he was satisfied that the applicant had or is still having connection with activities relating to trafficking of dangerous drugs and he could not reveal such activities as they are against national interest.

[33] Article 151(3) of the Federal Constitution and s 14 of Act 316 D empower him to do so.

[34] The court cannot question his decision not to disclose the facts sought by the applicant. He further contended that from the affidavit of the honourable Deputy Home Minister, it is clear that the deponent had applied E his mind to the contents of the investigation report of the police officer made under s 3(3) and the report of the inquiry officer done in accordance with under s 5(4) of Act 316 before he ordered the detention order.

[35] Section 11C(1) of Act 316 was referred to by learned federal counsel F to show that a court cannot exercise judicial review in respect of any act or decision made by the Minister in the exercise of his discretionary power save in regard to question on procedural non-compliance in relation to Act 316 governing such act or decision.

G **[36]** The court cannot question the allegations of facts on which the order is grounded. Section 153 of the Criminal Procedure Code which states particulars as to time, place and person of the alleged offence does not apply to such facts considered by the honourable Deputy Home Minister and it was also his discretion on whether the statement of the allegations of fact ought H to be supplied to the applicant.

Ground 4

Breach of natural justice — Advisory board

I **[37]** At the hearing before the Advisory Board, there was no infringement of the rules of natural justice. Yus Yulandy bin Mhd Jaafar, the secretary to the Advisory Board, in para 2 in encl 12 deposed as to why materials relating to the allegations of fact could not be shown to the applicant on account of

national security. In para 6 of the same enclosure it shows that natural justice had been complied with by the board.

[38] The board had given him a fair opportunity to make proper representations.

Ground 5

Inquiry officer

[39] The inquiry officer did not contravene s 5 of Act 316. She is legally qualified and Chinese interpreters were used during the investigations as seen in para 5 in encl 7 and 6 in encl 12.

[40] All the procedures were obeyed and the detention order is not defective

ISSUE

[41] Whether the detention order was made mala fide or the grounds of detention stated in the order do not fall within the scope and ambit of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) or there was procedural non-compliance?

COURT FINDINGS

Personal liberty

[42] First and foremost, the court is aware that the grant of habeas corpus is as of right and it does not possess the discretion to issue or not to issue the order if the applicant is unlawfully detained.

[43] This salutary rule was highlighted in the Federal Court cases of *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156 and *Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108.

[44] In the former, Suffian LP opined in relation to art 5(1) of the Federal Constitution:

> No person shall be deprived of his ... personal liberty save in accordance with law and hence power given by law to detain must be construed strictly and in cases of doubt or ambiguity, the court should lean in favour of the subject.

[45] In the latter, Lee Hun Hoe CJ (Borneo) viewed that:

> Further prevention detention is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with, there must be strict compliance as it affects matters of such fundamental importance as the liberty of the subject.
>
> In *Ex parte Johannes Choeldi & Ors*, Rigby J said to the effect that where personal liberty is concerned, an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

Burden of proof

[46] In the said Federal Court case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* the then learned Lord President, per Azmi:

> It is for the authority who has detained the person to show that he has been detained in exercise of a valid power. Once that is shown, it is for the detainee to show that the power has been exercised mala fide or improperly which means that it is made for a 'collateral' or 'ulterior' purpose that is a purpose other than those set out in art 151 ...

Mala fide

[47] A scrutiny of the overall contents in the affidavit (encl 2) of Tan Ya Lee affirmed on 23 October 2009 and the contention of learned counsel during the hearing which claimed that the allegations of fact could have been fabricated seem to suggest mala fide on the part of the respondents which led to the detention order.

[48] For example, the contents of para 4:

> Semasa Pemohon di tangkap, pihak polis tidak memberitahu alasan alasan tangkapan sepertimana di kehendaki oleh Perlembagaan Persekutuan.

[49] Paragraph 6:

> Semasa tahanan Polis, Pemohon tidak di beri peluang untuk menggunakan hak asasi Perlembagaan iaitu *Right to Counsel* dan lawatan keluarga.

[50] Paragraph 7:

> Semasa dalam tahanan polis 60 hari, tidak ada sebarang siasatan oleh polis, tiada saksi di panggil untuk siasatan dan telah melanggari Sek 3 Akta Dadah Berbahaya (Langkah Langkah Pencegahan Khas) 1985.

[51] Paragraph 15(p):

> Responden Pertama (the Honourable Deputy Home Minister) memberi alasan dan fakta pertuduhan yang berasas perintah tahanan adalah 'defektif dan vague' telah melanggari undang undang Perlembagaan Persekutuan dan Kanun Acara Jenayah dan Akta tersebut.

[52] The applicant did not adduce a shred of evidence to show that there is bad blood brewing between him and the respondents especially the third respondent that resulted in the 'fabrication' of the allegations of fact against him. For such a serious allegation, it is only fair and reasonable for the court to have cogent evidence produced before it in order to substantiate the claim.

[53] In any event, the court verily believes that the first and third respondents particularly the latter one, have a modern and sophisticated network system of intelligence to gather reliable information on activities prejudicial to the security and public order of the country. They were only carrying out their professional duties. Although it is not within the domain of the court to question the allegations of fact, nonetheless, in all probability there is no likelihood of obtaining baseless information against the applicant.

[54] Thus the court finds that there is no basis to allege fabrication.

[55] In the Federal Court case in *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914, it referred to the High Court case in *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468; [1988] 1 CLJ 197 where Peh Swee Chin J (as he then was) defined 'mala fide':

> Mala fide does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, that is, for a purpose other than the purpose for which it is professed to have been exercised.

[56] No information on the grounds of the applicant's arrest.

[57] At this juncture it is pertinent to this particular aspect of this subject matter to point out that the Dangerous Drugs (Special Preventive Measures) Act 1985, Act 316, was made pursuant to art 149 of the Federal Constitution titled Part XI — Special Powers against Subversion, Organised Violence and Acts and Crimes Prejudicial to the Public and Emergency Powers.

[58] Therefore any provisions therein contained that are inconsistent with arts 5 or 9 of the Federal Constitution cannot render Act 316 invalid or ultra vires the Constitution.

[59] Notwithstanding art 149, there is no express recitals or provision in Act 316 which allows preventive detention to infringe art 5(3) and in their absence, it cannot be assumed that the legislature when making Act 316, aimed to limit or abolish such a fundamental safeguard as entrenched in the Federal Constitution

[60] Police Inspector Abdul Majid bin Mohd Abd Kadir in his affidavit in para 9 in encl 6 had affirmed:

> ... Saya dengan sesungguhnya menyatakan bahawa Pemohon telah pun diberitahu sebab sebab tangkapan dan diberitahu tentang isi kandungan eksibit TYL 1 dan TYL 2.

[61] The former is the detention order made under s 6(1) of Act 316 while the latter contains the grounds and the allegations of fact on which the order is based.

[62] The court finds that the investigating officer had sufficiently informed the applicant of the grounds of his arrest when he mentioned that he gave the grounds of the arrest and also informed him about the contents in the detention order (exhs TYL1 and TYL2). It is implicit that the grounds are tied with the contents and thus he was being informed sufficiently.

[63] The applicant's wife in her affidavit deposed to that very moment when the applicant was arrested by the police, he was not informed of the grounds of his arrest as required by the Federal Constitution. Although Inspector Abdul Majid bin Mohd Abd Kadir did say that he had informed the applicant of the grounds for his arrest yet he did not mention at which point in time.

[64] Nevertheless, it is not incumbent upon him to inform the applicant on the spot when he was being arrested. Article 5(3) of the Federal Constitution only lays down that 'shall be informed as soon as may be of the grounds of his arrest ...'.

Right to counsel

[65] The same police officer had declared in his affidavit (encl 6) that he had told the applicant regarding his right to get the service of a lawyer although he did not tell at which stage of the investigation.

[66] Nonetheless, in the High Court case in *Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3)* [2001] 2 MLJ 689, His Lordship Mohd Hishamudin bin Mohd Yunus J (as he then was) cited the case of *Ooi*

Ah Phua v Officer in Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 where Suffian LP held that the right to consult a lawyer cannot be exercised immediately after arrest. This is because the presence of a lawyer may impede police investigation.

[67] He also cited *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116, where that court shared the same view.

[68] The applicant was also informed about his right to hire the service of a lawyer as seen in para 7 in encl 7, the affidavit affirmed by Puan Goh Yoke Ling, a staff member attached to Jabatan Siasatan Jenayah Narkotik, at the Police Headquarters in Penang who had acted as the Chinese interpreter.

[69] On 6 July 2009 at about 9.45pm, she was asked by the police investigating officer Inspector Abdul Majid bin Mohd Abd Kadir to interpret the contents in exhs 'TYL1' and 'TYL2' for the applicant.

[70] In short, based on the aforesaid case-law authorities, the constitutional right of the applicant to have access to legal advice must be subject to valid restriction in the interests of justice in order to avoid any undue interference during the course of police investigation. It does not mean that he could have immediate access.

Claim that no investigation was done during the police detention

[71] The applicant's wife also averred in her affidavit that throughout the 60 day police detention, no investigation was done by the police.

[72] In para 4 of the same enclosure, the investigating officer answered this allegation.

> Sebagai seorang Pegawai Penyiasat, saya bertanggung jawab untuk menjalankan penyiasatan terhadap Pemohon yang telah ditangkap di bawah Seksyen 3(1) Akta Dadah Berbahaya (Langkah Langkah Pencegahan Khas) 1985 dengan sesungguhnya, saya menyatakan bahawa penyiasatan secara rapi dan teratur telah dijalankan terhadap Pemohon ...

[73] What is of significance is that s 5(3) of Act 316 gives the inquiry officer a discretion on whether to summon a witness or procure documentary evidence for the purpose of an enquiry and thus it is groundless to assert that the first respondent did not comply with s 5(3) of Act 316. The section is not mandatory.

[74] In fact in the said Federal Court case of *Muhammad Jailani Kasim*, it was even held that it is not mandatory for the inquiry officer to carry out an inquiry under s 5 of the Act.

Vagueness of allegations of fact

[75] Learned counsel asserted that 'all the allegations of fact in this case are very, very vague' thus depriving the applicant his constitutional right under art 151 of the Federal Constitution to make effect representations.

[76] Enclosure 2 where para 15(p) states that 'alasan dan fakta pertuduhan yang berasas perintah tahanan adalah defektif dan vague'.

[77] In the cited Federal Court case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia*, the learned Lord President Azmi quoted the judgment of Lord Macmillan in *Liversidge v Sir John Anderson & Anor* [1942] AC 206:

> But how could a court of law deal with the question whether there was a reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fault? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share.
>
> The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence.

[78] In the mentioned Federal Court case of *Mohd Faizal Haris* it viewed that the subjective nature of the exercise of discretion by the Minister in ordering detention, the court is not to concern itself with the vagueness, sufficiency or relevancy, of the grounds of detention.

[79] Moreover the said case of *Karam Singh* had held that such vagueness, insufficiency or irrelevance of the allegations of fact do not relate back to the order of detention and cannot render unlawful detention (assuming that the court concurs with the argument of the applicant that his detention by the police was unlawful for non-compliance with s 3(2)(a) and (b) of Act 316) under a valid order of detention (again assuming at this juncture that the detention order was valid).

[80] Again in *Karam Singh*'s case, Suffian FJ referred to an Indian authority and viewed that:

> Vague can be considered as the antonym of 'definite.' If the ground which is supplied is incapable of being understood or defined with sufficient certainty, it can be called vague. It is not possible to state affirmatively more on the question of

> what is vague. It must vary according to the circumstances of each case, it is, however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it ...

[81] With all due respect to the applicant's learned counsel, this court begs to differ from him. Guided by the observation of Suffian FJ, it finds that the allegations of fact are not vague.

[82] Ali FJ in the same case opined that 'the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s 8(1)(a) of the Internal Security Act 1960 (drawing an analogy, the Dangerous Drugs (Special Preventive Measures) Act 1985) is a matter for the personal or subjective satisfaction of the executive authority'.

[83] The cited Federal Court case in *Mohd Faizal Haris* also concurred with this view.

[84] Moreover in the Indian case of the *The State of Bombay v Atma Ram Sridhar Vaidya* AIR 1951 SC 157, Sastri J held that:

> When the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation.

[85] It is also noteworthy to state that art 151(3) of the Federal Constitution does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[86] Section 14 of the Dangerous Drugs (Special Preventive Measures) Act 1985 states:

> Nothing in this Part or in any rules or regulations made thereunder shall require the Minister or any member of an Advisory Board or any Inquiry Officer or any public servant to disclose facts or to produce documents which he considers to be against the national interest to disclose or produce.

[87] Anyway, learned counsel for the applicant was present at the hearing before the Advisory Board and if the allegations of fact were ambiguous, he could have asked for some form of clarification but he did not avail himself of this opportunity.

Whether the grounds of detention stated in the detention order do or do not fall within the scope and ambit of the Dangerous Drugs (Special Preventive Measures Act) 1985? (Act 316)

[88] An examination of the grounds in the order show that they do slot in the scope and ambit of Act 316.

[89] The affidavit (encl 2) of Tan Ya Lee in para 15(i) states that:

> Alasan alasan Perintah Tahanan terkeluar dari skop Akta tersebut dan melanggari Sek 6 Akta tersebut. Responden Pertama telah melanggari Sek 6 Akta tersebut.

[90] The court finds that the honourable Deputy Home Minister had adhered to all the requirements of the provision of s 6 of Act 316, in particular s 6(1) and (2) and therefore the detention order is valid.

Procedural non-compliance

[91] To avoid needless repetition, the court will not delve into this subject matter as learned federal counsel had submitted on it by referring to the Federal Court case in *Mohd Faizal Haris* which gave a succinct answer.

[92] Assuming even that the third respondent did not comply with the requirements of s 3(2)(a) and (b) as harped on by learned counsel, this Federal Court case held that:

> ... Thus, even if the report of investigation is prepared as the result of an illegal arrest, the weight to be attached to it is a matter exclusively within the purview of the Minister. The court will not be concerned with the use of the report of investigation by the Minister. The consideration of a statement made by an illegally detained person cannot therefore be prohibited.
>
> The result is that the legality of the detention of a person under s 3(2) is not a condition precedent to the making of a detention order against him under s 6(1). A detention order can be made against a person under s 6(1) even when his detention under s 3(2) was irregular.
>
> Generally a writ of habeas corpus must be directed against the current order of detention even when the earlier arrest is irregular. It follows that where a detention order has been made under s 6(1), the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular.
>
> Thus any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration. A prior illegality which has ceased cannot be the subject matter of inquiry.

[93] The contention of the applicant that he was not given the inquiry report on the authority of the said Federal Court case of *Muhammad Jailani Kassim* is groundless. The facts in that case are distinguishable from this instant case. In that case there was no evidence to show the academic qualification of the inquiry officer as stipulated by the proviso to s 5(1) of Act 316. There was also no evidence to show that the inquiry officer had conducted the enquiry as required of him and no evidence was tendered by him to show the role played by him. Thus the respondents were obliged to produce the necessary evidence.

[94] Unlike the present case, the inquiry officer Shaharaliza bt Ab Razak had affirmed her affidavit on 4 December 2009 (encl 11) which stated the whole role played by her.

[95] All in all, this court finds that there was no mala fide in the making of the detention order, no procedural non-compliance and the grounds of detention stated in the order do fall within the scope and ambit of Act 316. Hence, the detention of the applicant is legal and not unlawful. The application is dismissed.

Application dismissed.

Reported by Mashrifah Ravendran